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Fed. Tort
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95TH CONGRESS
2D SESSION

S. 2868

IN THE SENATE OF THE UNITED STATES

APRIL 10 (legislative day, FEBRUARY 6), 1978

Mr. PERCY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide a remedy against the United States for torts arising under the Constitution or laws of the United States committed by officers or employees of the United States, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 1346 (b) of title 28, United States Code, is
4 amended—

5 (1) by striking the comma immediately following
6 “1945” and inserting in lieu thereof a dash and “(1)”;
7

8 (2) by striking the period at the end of the
9 subsection and inserting in lieu thereof a semicolon and
“or”;

II

1 (3) by adding at the end thereof the following:

2 “(2) for any tort arising under the Constitution or
3 laws of the United States caused by the negligent or
4 wrongful act or omission of any employee of the Gov-
5 ernment while acting within the scope of his office
6 or employment, or under color thereof, such liability to
7 be determined in accordance with applicable Federal
8 law.”.

9 SEC. 2. Section 2672 of title 28, United States Code,
10 is amended—

11 (1) by inserting a dash and “(a)” in the first para-
12 graph immediately before “for injury”;

13 (2) by inserting in the first paragraph immediately
14 before the colon the following: “, or (b) for any tort
15 arising under the Constitution or laws of the United
16 States caused by the negligent or wrongful act or omis-
17 sion of any employee of the United States while acting
18 within the scope of his office or employment, or under
19 color thereof, such liability to be determined in accord-
20 ance with applicable Federal law”; and

21 (3) by striking out the third paragraph and insert-
22 ing in lieu thereof the following:

23 “Any award, compromise, or settlement made pursuant
24 to this section or made by the Attorney General pursuant
25 to section 2677 or 2679 shall be paid by the head of the

1 Federal agency concerned out of appropriations available
2 to that agency.”.

3 SEC. 3. Section 2674 of title 28, United States Code,
4 is amended—

5 (1) by striking out the first paragraph and insert-
6 ing in lieu thereof the following:

7 “(a) (1) Except as otherwise provided in this section,
8 the United States shall be liable, respecting the provisions
9 of this title relating to claims for injury or loss of property,
10 or personal injury or death caused by the negligent or wrong
11 ful act or omission of any employee of the Government while
12 acting within the scope of his office or employment, in the
13 same manner and to the same extent as a private individual
14 under like circumstances, but shall not be liable for interest
15 prior to judgment or for punitive damages.”;

16 (2) by inserting “(2)” in the second paragraph
17 immediately before “If”; and

18 (3) by adding at the end thereof the following:

19 “(b) (1) The United States shall be liable, respecting
20 the provisions of this title relating to claims for any tort
21 arising under the Constitution or laws of the United States
22 or for any intentional tort, for actual damages to the same
23 extent as entitlement to such damages is recognized under
24 the law of the place where the act or omission occurred, for a
25 reasonable attorney’s fee and other litigation costs reason-

1 ably incurred, for general damages relating to mental and
2 physical pain and suffering not to exceed \$100,000, and, in
3 the discretion of the court, for punitive damages not to exceed
4 \$50,000, and reasonable interest prior to judgment. In any
5 claim for a tort arising under the Constitution, damages
6 awarded shall not be less than \$1,000.

7 “(2) The United States may not assert as a defense to
8 an action arising under the Constitution the absolute or quali-
9 fied immunity of the employee (except Members of Con-
10 gress, judges, or prosecutors, or agents thereof) or the good
11 faith belief of the employee in the lawfulness of his conduct.

12 “(c) For purposes of this section—

13 “(1) a tort is intentional only if the act or omission
14 giving rise to such tort is knowing and willful; and

15 “(2) any award of damages, interest, or attor-
16 neys’ fees under this section shall be paid by the head
17 of the Federal agency whose employee committed such
18 tort out of appropriations available to that agency.”.

19 SEC. 4. Section 2675 (a) of title 28, United States
20 Code, is amended---

21 (1) by inserting immediately after “employment,”
22 the following: “or upon a claim against the United
23 States for money damages arising under the Constitu-
24 tion or laws of the United States caused by the negligent
25 or wrongful act or omission of any employee of the Gov-

1 ernment while acting within the scope of his office or
2 employment or under the color thereof,";

3 (2) by inserting immediately after the first sentence
4 the following: "Upon a claim against the United States
5 for money damages arising under the Constitution of the
6 United States, class actions in conformity with the re-
7 quirements of the Federal Rules of Civil Procedure may
8 be instituted provided that the claim presented to the
9 appropriate Federal agency expressly asserts the rep-
10 resentative nature of the claim and specifically describes
11 the members of the class, the common interests of the
12 claimant and such members, and the basis upon which
13 the claimant believes he can fairly and adequately pro-
14 tect the interests of the class as their representative.".

15 SEC. 5. Section 2676 of title 28, United States Code, is
16 amended by striking out "The" and inserting in lieu thereof
17 "Except as otherwise provided in section 2679 (b) (2),
18 the".

19 SEC. 6. Section 2679 of title 28, United States Code,
20 is amended—

21 (1) by amending subsection (b) to read as follows:
22 “(b) (1) The remedy against the United States provided
23 by sections 1346 (b) and 2672 of this title with respect to
24 claims for injury or loss of property, or personal injury or
25 death caused by the negligent or wrongful act or omission of

1 any employee of the Government while acting within the
2 scope of his office or employment is exclusive of any other
3 civil action or proceeding, arising out of or related to the
4 same subject matter, against the employee whose act or
5 omission gave rise to the claim or against the estate of such
6 employee.

7 “(2) The remedy against the United States provided by
8 sections 1346 (b) and 2672 of this title with respect to claims
9 for any tort arising under the Constitution or laws of the
10 United States or for any intentional tort, caused by an em-
11 ployee of the Government while acting within the scope of his
12 office or employment, or under color thereof, is exclusive of
13 any other civil action or proceeding, arising out of or related
14 to the same subject matter, against the employee whose act
15 or omission gave rise to the claim or against the estate of such
16 employee, unless such employee acted recklessly or did not in
17 good faith believe the lawfulness of his conduct. For any such
18 tort claim in which such employee acted recklessly or in
19 which such employee did not in good faith believe the lawfulness
20 of his conduct, an action may be brought against either
21 the United States as provided in sections 1346 (b) (2) and
22 2672, or against such employee (or the estate of such em-
23 ployee) in his individual capacity. Whenever the action is
24 brought against the United States under sections 1346 (b)
25 (2) and 2672, the remedy is exclusive of any other civil

1 action or proceeding, arising out of or related to the same
2 subject matter, against the employee whose act or omission
3 gave rise to the claim or against the estate of such employee.
4 Whenever the action is brought against such employee (or
5 the estate of such employee) in his individual capacity, the
6 remedy is exclusive of any other civil action or proceeding,
7 arising out of or related to the same subject matter, against
8 the United States under sections 1346 (b) (2) or 2672.

9 “(3) For the purposes of this section, a tort is inten-
10 tional only if the act or omission giving rise to such tort is
11 knowing and willful.”;

12 (2) in subsection (c), by adding at the end
13 thereof the following: “This subsection is not applicable
14 to any action brought against such employee (or the es-
15 tate of such employee) in his individual capacity.”;

16 (3) by amending subsection (d) to read as fol-
17 lows:

18 “(d) (1) Except as provided in paragraph (4), upon
19 certification by the Attorney General that the defendant
20 employee was acting within the scope of his office
21 or employment, or in claims arising under the Constitution
22 or the laws of the United States that the employee was
23 acting within the scope of his office or employment or under
24 the color thereof, at the time of the act or omission out of
25 which the action arose, any such civil action or proceeding

1 commenced in a United States district court shall be deemed
2 an action against the United States under the provisions of
3 this title and all references thereto, and the United States
4 shall be substituted as the party defendant. After such sub-
5 stitution the United States shall have available all defenses
6 to which it would have been entitled if the action has origi-
7 nally been commenced against the United States under this
8 chapter and section 1346 (b).

9 “(2) Except as provided in paragraph (4), upon
10 certification by the Attorney General that the defendant
11 employee was acting within the scope of his office or employ-
12 ment, or in claims arising under the Constitution or the laws
13 of the United States that the employee was acting within
14 the scope of his office or employment, or under the color
15 thereof, at the time of the act or omission out of which the
16 action arose, any such civil action or proceeding commenced
17 in a State court shall be removed, without bond, at any time
18 before trial, by the Attorney General to the district court of
19 the United States of the district and division embracing
20 the place wherein it is pending and be deemed an action
21 brought against the United States under the provisions of
22 this title and all references thereto, and the United States
23 shall be substituted as the party defendant. After such sub-
24 stitution the United States shall have available all defenses to
25 which it would have been entitled if the action had originally

9

1 been commenced against the United States under this chap-
2 ter and section 1346 (b) . The certification of the Attorney
3 General shall conclusively establish scope of office or employ-
4 ment and in claims arising under the Constitution or laws
5 of the United States, scope of office or employment or act-
6 ing under color thereof, for purposes of such initial removal.
7 Should a district court of the United States determine on a
8 hearing on a motion to remand held before trial on the merits
9 that the employee defendant was not acting within the scope
10 of his office or employment, and in claims arising under the
11 Constitution or laws of the United States, acting within the
12 scope of his office or employment or under color thereof, the
13 case shall be remanded to the State court in which it was
14 initially filed.

15 “ (3) Where an action or proceeding under this chapter
16 is precluded because of the availability of a remedy through
17 proceedings for compensation or other benefits from the
18 United States as provided by any other law, the action or
19 proceeding shall be dismissed, but in that event the running
20 of any limitation of time for commencing, or filing an appli-
21 cation or claim in, such proceeding for compensation or other
22 benefits shall be deemed to have been suspended during the
23 pendency of the civil action or proceeding under this chapter.

24 “ (4) Paragraphs (1) and (2) of this subsection shall
25 not apply to any action brought against an employee (or

1 the estate of such employee) in his individual capacity for
2 a tort arising under the Constitution or laws of the United
3 States or for any international tort, in which it is alleged
4 that the employee acted recklessly or did not in good faith
5 believe the lawfulness of his conduct.”;

6 (4) by adding at the end of such section the follow-
7 ing:

8 “(f) Whenever an action is brought against the United
9 States under sections 1346 (b) (2) and 2672 rather than
10 against the employee (or the estate of such employee) in
11 his individual capacity, the United States shall have a right
12 of indemnity against the employee whose act or omission
13 gave rise to the claim or against the estate of such employee,
14 for all or part of the amount of its liability. The United
15 States may enforce such right of indemnity in a separate civil
16 action or proceeding in any district court or by filing a third
17 party complaint against such employee or his estate in the
18 action brought by the claimant under this section, without
19 regard to the amount in controversy.”.

20 SEC. 7. Section 2680 of title 28, United States Code, is
21 amended—

22 (1) by amending the matter preceding paragraph
23 (a) to read as follows: “Except for tort claims arising
24 under the Constitution of the United States or laws of the

1 United States, the provisions of this chapter and section
2 1346 (b) of this title shall not apply to—”; and

3 (2) by repealing paragraph (h).

4 SEC. 8. (a) Subsections (a) through (d) of section
5 4116 of title 38, United States Code, are repealed, and sub-
6 section (e) of that section is amended by deletion of the
7 designation “(e)”, by deleting the words “person to whom
8 the immunity provisions of this section apply (as described
9 in subsection (a) of this section),” and inserting in lieu
10 thereof the words “employee of the Department of Medicine
11 and Surgery”.

12 (b) Subsections (a) through (e) of section 224 of the
13 Public Health Service Act, as added by section 4 of the Act
14 of December 31, 1970, and renumbered (42 U.S.C. 233 (a)
15 through (e)), are repealed, and subsection (f) is amended
16 by deletion of the designation “(f)”.

17 (c) Subsections (a) through (e) of section 1091 of the
18 Foreign Service Act of 1946, as added by section 119 of the
19 Act of July 12, 1976 (22 U.S.C. 817 (a) through (e)) are
20 repealed.

21 (d) Subsections (a) through (e) of section 1089, title
22 10, United States Code, are repealed. Subsection (f) is
23 amended by deleting the words “person described in sub-
24 section (a)” and inserting in lieu thereof the words “em-

1 ployee of the Armed Forces, the Department of Defense, or
2 the Central Intelligence Agency,”.

3 (c) Subsections (a) through (e) of section 307 of the
4 National Aeronautics and Space Act of 1958, as added by
5 section 3 of the Act of October 8, 1976 (42 U.S.C. 2458a
6 (a) through (e)), are repealed, and subsection (f) is
7 amended by the deletion of the designation “(f)”, by the
8 deletion of the words “person described in subsection (a)”
9 and by the insertion in lieu thereof of the words “employee
10 of the National Aeronautics and Space Administration”.

11 SEC. 9. This Act shall apply to all claims filed or accru-
12 ing on or after the date of enactment of this Act.

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